AMERICAN LOCOMOTIVE CO. et al. *v.* HOFFMAN.

June 11, 1908.

[61 S. E. 759.]

1. Waters and Water Courses—Injuries by Flooding Caused by Lawful Act—Liability.—Where a person's land is flooded by the lawful erection of culverts and a fence and water gate by another on his own land, no cause of action arises on account of the construction itself, but the gist of the injured person's action is the damage from flooding, for which successive actions may be brought for recurring injuries resulting from a continuance of the nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 233-236, 238.]

2. Same—Successive Floodings—Actions—Elements of Damage.—In an action brought to recover injury to land by several overflows caused by the construction of a culvert, and not for entire damages, the diminution of the fee-simple or market value of the premises is not to be considered in ascertaining damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 251-255.]

3. Same—Unsanitary Condition of Premises.—In an action for injuries to land caused by flooding, evidence of the unhealthful condition of the premises after the floods is admissible, where such condition was alleged as a ground for damages.

4. Appeal and Error—Reservation of Ground of Review—Changing Ground of Objection.—A party may not specify certain grounds of objection to evidence offered in the trial court and rely upon other grounds on appeal, but he is regarded as having waived all objections except those which he specifically pointed out, and hence a party who objected to evidence that premises which had been flooded were in an unsanitary condition, on the ground that there was no allegation to support it, cannot contend on appeal that it was improperly admitted because the witnesses were ignorant of the condition of the premises after the floods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1426-1431.]

5. Waters and Water Courses—Injuries by Flooding—Liability.—The fact that a person has partially obstructed a stream does not prevent him from recovering damages from another caused by the other's further obstruction of the stream.

6. Negligence—Trial—Instructions—Due Care.—A charge that care required under certain circumstances was "that which a discreet and cautious individual would or ought to have used" is in effect equivalent to charging that the care required was "that which an

ordinarily prudent man would have exercised under all the circumstances of the case."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 371-377.]

Error to Circuit Court, Henrico County.

Action by one Hoffman against the American Locomotive Company and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded for a new trial.

John A. Lamb and *C. R. Sands,* for plaintiff in error.

McGuire, Riely & Bryan and *W. R. Meredith,* for defendant in error.

BUCHANAN, J. This is the second time this case has been in this court. The case upon the former writ of error is reported under the same style in 105 Va. 343-354, 54 S. E. 25, 6 L. R. A. (N. S.) 252. No further statement of the case is necessary beyond what is there found, except as to the proceedings had since then.

After the cause was remanded for a new trial, the plaintiff amended his declaration by adding eight counts, and by striking out the second and sixth counts of the declaration as it was upon the former trial. The object of the new counts was to recover damages for injuries alleged to have been suffered by the plaintiff from flooding, arising from the same causes, between the time of bringing the action and the filing of the last amended declaration. Upon the trial on this amended declaration, there was a verdict and judgment for the plaintiff. To that judgment this writ of error was awarded.

The first error assigned is to the action of the court in admitting evidence as to the difference in the fee-simple or market value of the plaintiff's premises immediately before it was first overflowed, in December, 1902, and after the last overflow in July, 1906. The same question is raised by instruction numbered 5, given at the request of the plaintiff, which told the jury that, if they found for the plaintiff, in assessing his damages they should take into consideration the actual loss sustained by him as shown by the evidence, and in arriving at such damages the jury might consider the market value of the property as shown by the evidence before it was first flooded and after it was last flooded, any incumbrance or annoyance to which the plaintiff was subjected, and any amount which the evidence showed had been expended by the plaintiff in cleaning and repairing the premises.

Whether or not that evidence was admissible, and the giving of that instruction proper, depends upon the character of the ob-

struction or nuisance complained of, and the object of the action. See Southside R. Co. *v.* Daniel, 20 Grat. 344; 2 Farnham on Waters, §§ 589, 589a.

In the case of Southside R. Co. *v.* Daniel, *supra*, at page 367, it was said by Judge Staples, in delivering the opinion of the court, that, where the act complained of 'is unlawful in itself, a right of action accrues immediately, and is held to include all subsequent damage flowing from it. And in such cases there can be but one recovery between the parties, as the injury is not the cause of the action.

"Where, however, the act is lawful in itself, but negligently and improperly performed, the gist of the action is the damage, without which there can be no recovery," and, until such damage does occur, there is no cause of action; and for repeated injuries resulting from the same cause repeated actions may be brought.

The principles announced in that case are recognized and approved in the recent case of Va. Hot Springs Co. *v.* McCray, 160 Va. 461, 472, 473, 56 S. E. 216, 10 L. R. A. (N. S.) 465.

The erection of the culverts and the fence and water gate in this case, being upon the defendants' own land, was not an unlawful act in itself, and no cause of action could arise until damage resulted to the plaintiff therefrom; and new actions could be brought for recurring injuries resulting from a continuance of the nuisance. Southside R. Co. *v.* Daniel, *supra*.

This action was not brought to recover entire damages, even if the facts of the case would have authorized it. This is clear from the declaration itself. It claims damages for overflows caused by seven different freshets. After the case was remanded for a new trial, the manifest object in amending the declaration by adding the eight new counts was to recover damages for overflows caused by freshets subsequent to the institution of the action, and to avoid the necessity of bringing another action therefor. This being an action to recover damages for injuries done to the plaintiff's premises by reason of the overflows which had occurred prior to the filing of the plaintiff's last amended declaration, and the defendant being liable to succession of actions for subsequent injuries caused by a continuance of the nuisance, if it was one, the diminution in the fee-simple or market value of the premises was not a proper subject to be considered by the jury in ascertaining the damages; for it would be manifestly unjust to permit the plaintiff to recover as damages a sum equal to the diminution of the market or fee-simple value of his premises, and still have the right to successive actions against the defendants for a continuance of the nuisance. See Batishill *v.* Reed, 18 C. B. 696; reported also in Sedgwick's Lead. Cases on the Measure of Damages.

We are of opinion that the court erred in admitting the evidence and in giving the instruction.

Evidence was admitted as to the unsanitary condition of the plaintiff's premises, alleged to have been caused by the overflows complained of. This action of the court was objected to upon the ground that there was no claim for such damages alleged in the declaration.

In counts 1 and 9 of the declaration there were allegations as to the unhealthy condition of the property after the floods, respectively, of December, 1902, and of June, 1905. Under these counts, evidence of the facts alleged was admissible; and if it be true, as stated, that the witnesses who testified as to the unsanitary condition of the premises knew nothing of their condition after those floods, then the defendants should have asked the court not to admit any evidence on that subject, except, as to those floods, instead of objecting on the ground they did; for a party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court, and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he pointed out specifically. Warren *v.* Warren, 93 Va. 73, 24 S. E. 913.

The action of the court in giving the other four instructions asked for by the plaintiff is assigned as error.

Instruction No. 1 is as follows: "The court instructs the jury that it was the duty of the defendants in building their fence and water gate across, and constructing their culverts in, Cannon's Branch, to so build said fence and water gate and construct said culverts as not to obstruct such flow of water as the defendants might reasonably have expected would occasionally flow down Cannon's Branch, including the ordinary rise of said branch at periodically recurring freshets. And if the jury believe from the evidence that the flows of water in Cannon's Branch, upon the occasions complained of in the declaration, were not greater than that which the defendants might reasonably have expected would flow down said Cannon's Branch on such occasions, then it was the duty of the defendants to have anticipated such flows of water, and to have so built said fence and water gate and constructed said culverts that neither said fence and water gate nor said culverts would, under such circumstances, have caused the water to back upon the plaintiff's property. And, if the jury believe from the evidence that the defendants failed to so build said fence and water gate or construct said culverts, and failed to provide other ways sufficient for the passage of the water down Cannon's Branch on such occasions, and as a consequence

thereof the plaintiff was injured then the defendants are liable to the plaintiff."

The objection is made in this instruction that "it violates the settled rule of this court that, where an instruction concludes with a direction that the jury shall find for the plaintiff, such direction can only be based upon the absence of negligence on the part of the plaintiff contributing to the injury where there is any proof in the record of such contributory negligence and the instruction should so state." The contention of the defendants is that, as there was evidence tending to show that the damages done to the plaintiff's property were due, in part at least, to his having erected his house on a part of the lot which at high water was covered wholly or partly by the waters of Cannon's Branch, and that the erection of the wall around the house to keep the water off the lot narrowed the channel in places, filled it in, deflected the stream, and caused it to flow into the rear gateway or entrance to his lot, the plaintiff was guilty of contributory negligence, and, if so, he could not recover.

The fact, if it was a fact, that the plaintiff had prior to the time the defendants built the fence, water gate, and culverts, partially obstructed the stream by the house and wall which he had placed upon his lot, did not, as the defendants insist, prevent him from maintaining an action against them to recover damages for injuries resulting from, or caused by, further obstructions on their part. They would not, of course, be liable for the damages caused by the plaintiff's obstructions, but they would be for damages caused by their own. Any other rule would work the greatest injustice. It would be a license to the lower riparian proprietor to obstruct the stream in any manner he saw proper, even to the destruction of the premises above him, where it owner had obstructed the stream in any manner, however slight. See Brown *v.* Dean, 123 Mass. 254; Riddle's Ex'rs *v.* Delaware County, 156 Pa. 643, 27 Atl. 569; 2 Farnham on Waters, § 595, and cases cited in notes to the section.

It is not altogether clear whether it was intended by the instruction in question to tell the jury that, if they found for the plaintiff, the defendants were liable for all the damages suffered by the plaintiff, or that they were liable for only such damages as resulted from or were caused by the obstructions which they had placed in the stream. On the next trial, if a like instruction is asked for, it should be unambiguous on this point.

The objection made to instruction No. 2 is that the court erred in defining the degree of care it was the duty of the defendants to exercise in building their fence and water gate and in constructing their culverts, in this: that it told the jury that the care and prudence required was that which a discreet and

cautious individual would or ought to have used for the purpose of protecting himself from injury, when it should have told them that the care required was that which an ordinarily prudent man would have exercised under all the circumstances of the case.

The degree of care required in such cases is that contended for by the defendants; but, as we construe the instruction, it does in effect what the defendants say it ought to have done. Upon the next trial, however, if an instruction on this point is asked for, it can be made entirely plain.

The objections to instructions 3 and 4 are without merit. There was evidence in the case tending to prove the facts upon which they are based, and there was nothing in the form or language of No. 3 to mislead the jury.

For the errors pointed out, the judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

Note.

No very satisfactory definitions can be found in the books by which to determine what are permanent or temporary obstructions or nuisances. In one case, a permanent obstruction in a stream was defined as follows: "A permanent structure is one that is to continue for all time except for some unforeseen event, while a temporary structure is one erected for a known temporary and limited business." Pickens *v.* Boom & Timber Co., 51 W. Va. 445.

A nuisance which may be discontinued is not a permanent one. Lurssen *v.* Lloyd, 76 Md. 360, 25 Atl. 294; Pond *v.* Railway Co., 112 N. Y. 186, 19 N. E. 487; Cleveland, C., C. & St. L. Ry. Co. *v.* King, 23 Ind. 573, 55 S. E. 875.

A nuisance may be of a permanent character, but one which may be discontinued, and which the law presumes will be, is not of that character. Where the wrong constituting the nuisance is not permanent, but may be discontinued, the measure of damages is not the depreciation in the value of the property. Baugh *v.* Railroad Co. (Tex. Sup.), 15 S. W. 587; Pond *v.* Railway Co., 112 N. Y. 186, 19 N. E. 487; Brewing Co. *v.* Compton, 142 Ill. 511, 32 N E. 693; Bare *v.* Hoffman, 79 Pa. St. 71; Johnson *v.* Porter, 42 Conn. 234; Aldworth *v.* Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210; Cleveland, C., C. & St. L. Ry. Co. *v.* King, 23 Ind. 573, 55 S. E. 875.

An injury may be permanent without continuing forever. An injury to be permanent, must be something more than a mere temporary inconvenience; it must be lasting. Accordingly it was held, in a suit to restrain the defendants from obstructing "a creek, or erecting a dam or stopping therein, or impeding the flow or fall of the tides in said creek, and from altering the same in any manner whatever," that the erection of a dam may constitute a permanent injury to land, even though it may not continue forever. Bassett *v.* Johnson, 2 N. J. Eq. 154.

In another case it was held, that while the word "permanent" does

not necessarily mean forever, or that the nuisance should be perpetual, the word always conveys the idea of a continuance in the same state.

The case of Railway Co. *v.* Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, grew out of the removal of the railway shops that had been located under a contract. It was held, that the word "permanent," in the contract, should be construed with reference to the subject matter of the contract, and that under the authorities of the case, the contract for the permanent location of the shops had been complied with by the establishment of the terminus and the offices and shops of the company contracted for, with no intention at the time of removing or abandoning them.

Casting Offensive Materials into Streams.—Where the acts complained of as constituting a nuisance consisted of defendant's casting into a large pond near plaintiff's premises carloads of dirt and offensive material, causing the water to become foul and poisonous, the nuisance was one which could be removed, and hence plaintiff could not recover as for permanent injury. Cleveland, C., C. & St. L. Ry. Co. *v.* King, 23 Ind. 573, 55 N. E. 875.

City of Paris *v.* Allred (Tex. Civ. App.), 43 S. W. 62, was an action for damages for a nuisance. The evidence showed the construction and operation of a sewer by defendant, whereby its sewage was discharged into a branch running through plaintiff's lands, rendering the water unfit for use, carrying the noxious water upon his lands, and poisoning the air about his dwelling house, which nuisance appeared to be permanent in its character. Held, sufficient to establish plaintiff's allegations as to permanent damages to his land, and to support a verdict for plaintiff on such issue; and, where a nuisance created and maintained by the defendant was of a permanent character, plaintiff was entitled to recover in a single action all the damages that have accrued or may accrue in consequence of such injury, the measurement thereof being the depreciation in the value of his lands by reason of such nuisance.

Booms Erected in Streams.—In Pickens *v.* Boom & Timber Co., 51 W. Va. 446, the court in holding a boom, which obstructed the water in such manner as to cause a deposit for and in the bed of the stream, not to be a permanent nuisance or obstruction, said: "The deposit of sand is a nuisance to plaintiff's property not of a permanent nature, for there is nothing more shifting than sand, especially when under the influence of moving waters. If the boom caused the deposit, its removal, reformation or destruction will entirely remove the holding back force and the unrestrained waters will soon reduce the river bed to its natural level. The giving of permanent damages to the full extent claimed in the declaration would be equivalent to a transfer of plaintiff's water power to the defendant. This plaintiff cannot demand for defendant has the right to abate the nuisance and stop the injury and plaintiff can only ask that until it does so it pay him damages for the continuance thereof, such damages as he suffers by loss of the temporary use of his water power."

Single Action for Permanent Nuisance.—With regard to actions for damages arising from the flooding of land, it seems definitely settled upon authority that where an injury to land is caused by a work or erection which is permanent in its character and which is necessarily injurious, the entire damage, present and prospective, accrues at once and is the subject of a single action. Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792; Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145; Bunten *v.* Chicago, etc., R. Co., 50

Mo. App. 414; Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365; Platt *v.* Curtiss, 89 Ill. App. 575.

In case of a nuisance, if the act done is necessarily injurious and is of a permanent nature, the party injured may at once recover his damages for the whole injury. If the act done is not necessarily injurious, or if it is contingent whether further injury may arise, the plaintiff can recover damages only to the date of his writ. Troy *v.* Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

Where a railroad company makes an opening in an embankment, which opening is designed for a cattle way, and is not practicable for a water way, the case is the same as if the embankment had been solid and the injury is permanent and the damages recoverable entire. Haisch *v.* Keokuk, etc., R. Co., 71 Iowa 606.

Successive Actions for Continuing Nuisances.—When, however, the injury is only temporary in character, or does not involve the entire destruction of the estate or its beneficial use, as where the land is overflowed only at uncertain intervals, each successive overflow is, in judgment of law, a fresh nuisance and injury, and creates a separate cause of action. Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, 36 Am. St. Rep. 359; Ohio, etc., R. Co. *v.* Wachter, 123 Ill. 440, 5 Am. St. Rep. 532; Ohio, etc., R. Co. *v.* Dooley, 32 Ill. App. 228; Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; Mississippi, etc., R. Co. *v.* Archibald, 67 Miss. 38; Van Hoozier *v.* Hannibal, etc., R. Co., 70 Mo. 145; Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365; Omaha, etc., R. Co. *v.* Standen, 22 Neb. 343; Carriger *v.* East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388.

Successive actions may, therefore, be had for such damages as have accrued up to the time of the institution of the suit.

The opinion in the case of Wells *v.* Railroad Co., 151 Mass. 46, 23 N. E. 724, holds that the construction of a culvert across a watercourse is a continuing nuisance, that successive actions may be maintained, and that an action is not barred by the six-years limitation; the court evidently holding that the injury was temporary.

In an action by E. against H.'s executor to recover damages for injury to his land by the overflowing and sobbing of his land lying on a stream on which H. had built a dam in 1848, in the county of Louisa, E. having sued H. in his lifetime for damages to his lands from the erection of the dam, and a judgment in that case having been rendered in 1859 in favor of H., in this second suit E. can only recover for damages occasioned by the continuance of the dam subsequently. Ellis *v.* Harris, 32 Gratt. 684.

The only specific injury shown to property by a nuisance was the pollution of a well, but its value was not given. The nuisance had continued 12 months, and the rental value had depreciated $5 per month. Held, that, the nuisance not being permanent, plaintiff could recover only to time of suit, and hence a verdict for $900 was excessive. Cleveland, C., C. & L. Ry. Co. *v.* King, 23 Ind. 573, 55 S. E. 875.

In an action to recover for overflowing lands, a recovery cannot be had for injuries accruing after commencement of the suit; but evidence of such injuries is admissible, with a view of affording information to the jury of the consequences of the diversion under similar circumstances before suit brought. Polly *v.* McCall, 37 Ala. 20.

Where a party is authorized by an act of the legislature to erect and maintain a dam in a public river, and provision is made by the act for the assessment of damages in case the lands of others are injured by the flowing of the water of the river occasioned by such dam, the rule of damages is not the value of the land, but the an-

nual value thereof from the time the injury commenced until the assessment of the damages. Baldwin *v.* Calkins, 10 Wend. (N. Y.) 166.

Who May Recover When Injury Is Permanent.—It follows as a necessary consequence that where the injury to land is permanent, the right of action therefor lies in him who was the owner of the land when the erection was made or its injurious consequences first demonstrated, and such right of action does not pass to a subsequent purchaser of the land except by assignment. Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22.

And this although the former owner may not have brought any suit for the original injury. Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312.

Thus, where a railroad is constructed so as to stop the flow of water and cause a pond to be formed on adjoining land, a subsequent purchaser cannot recover for the loss of the land covered by the water. Illinois Cent. R. Co. *v.* Allen, 39 Ill. 205; Chicago, etc., R. Co. *v.* Henneberry, 28 Ill. App. 110; Toledo, etc., R. Co. *v.* Morgan, 72 Ill. 155.

Who May Recover When Injury Is Temporary.—But when the injury is merely temporary and the damages are to be recovered in successive actions, every successive purchaser of the land thus overflowed is entitled to recover for the injury suffered by him. St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552; Terre Haute, etc., R. Co. *v.* McCoy, 113 Ind. 498, 34 Am. & Eng. R. Cas. 212; Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22; Wells *v.* New Haven, etc., Co., 151 Mass. 46, 21 Am. St. Rep. 423; McKee *v.* St. Louis, etc., R. Co., 49 Mo. App. 174; Carriger *v.* East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388; Sellers *v.* Texas Cent. R. Co., 81 Tex. 458, 48 Am. & Eng. R. Cas. 77; Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, and the fact that the plaintiff was not the owner of the land at the time the erection was made is, therefore, immaterial. Mississippi, etc., R. Co. *v.* Archibald, 67 Miss. 38; Carriger *v.* East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388.

A subsequent grantee of land may maintain an action for damages resulting, during a freshet, from overflowing backwater caused by the negligent construction of a railroad bridge, prior to his purchase, over a natural watercourse flowing through his land, the cause of action for such damages accruing at the time of the overflow and not at the time the bridge was constructed. Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22.

Summary.—We think it may be fairly said from the consideration of the cases referred to, and from many others that might be cited, that, where damages have been allowed for prospective injury, the cause—the nuisance—was deemed to be permanent in its nature, although courts have differed as to what was a permanent or a temporary injury. See note to Virginia Hot Springs Co. *v.* McCray, 13 Va. Law Reg. 25, 10 L. R. A., N. S., 465.

RICHLANDS OIL CO. *v.* MORRISS.

June 11, 1908.

[61 S. E. 762.]

1. Mines and Minerals—Oil and Gas Leases—Interest in Land.—A lease giving the lessees the right to prospect for oil and gas, in